

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Wireless Telecommunications Bureau Seeks)
Comments on Petition for Declaratory)
Ruling Concerning the Requirement for)
Good Faith Negotiations Among Economic)
Area Licensees and Incumbent Licensees)
In the Upper 200 Channels of the 800 MHz)
Band)

PR Docket No. 93-144

To: Chief, Wireless Telecommunications Bureau

REPLY COMMENTS

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits these Reply Comments pursuant to the November 29, 2000 *Public Notice* regarding Nextel's Petition for Expedited Declaratory Ruling (the "Nextel Petition") with respect to the good faith negotiation requirements under Section 90.699 of the Federal Communications Commission's ("Commission") Rules.¹

As detailed below, the record establishes that under existing precedent incumbent Specialized Mobile Radio ("SMR") licensees in the upper-200 800 MHz band have an obligation to provide basic system data to Economic Area ("EA") licensees as part of the "good faith" negotiation process under Section 90.699 of the Commission's Rules. The Wireless Telecommunications Bureau (the "Bureau") should confirm this requirement in order to facilitate the completion of negotiated relocations and reduce the number of

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¹ Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Concerning the Requirement for Good Faith Negotiations Among Economic Area Licensees and Incumbent Licensees in the Upper 200 Channels of the 800 MHz Band, *Public Notice*, DA 00-2694 (November 29, 2000) ("*Public Notice*").

contested involuntary relocation proceedings that will need to be resolved on a case-by-case basis.

I. INTRODUCTION

As reported in the Nextel Petition, Nextel has successfully reached relocation agreements with more than 95% of upper-200 800 MHz incumbent licensees. This demonstrates that the balance struck by the Commission under the relocation provisions, between the interests of EA licensees and incumbent licensees, is functioning properly in the overwhelming number of cases.² The vast majority of incumbent licensees have adhered to the good faith negotiation requirements of Section 90.699(b)(2), and have provided basic technical data to EA licensees to facilitate relocations – i.e., the same information that is covered by the Nextel Petition. Indeed, some of the remaining incumbent licensees that are still negotiating relocation agreements have negotiated in good faith and have provided the requisite technical information.³

Nevertheless, there is a small group of “holdouts” that, despite repeated requests, have refused to provide basic technical data, taking the position that the mandatory negotiation provisions of §90.699(b)(2) do not require such disclosure. It is for the

² 47 CFR §90.699.

³ One of the commenters in this proceeding, Robin Critchell, is just one example of an upper-200 800 MHz incumbent licensee who provided necessary technical information to Nextel.

benefit of this group that Nextel urges the Bureau to confirm the obligation to provide basic technical data.⁴

Nextel does not seek to change the applicable rules or the balance that the Commission has already struck between EA licensees and incumbents. The good faith negotiation requirement, however, necessarily includes the obligation of an incumbent to disclose basic technical information needed for an EA licensee to develop a relocation plan. Not only is this supported under existing legal precedent, but any contrary interpretation would render the negotiation/relocation provisions of Section 90.699 unworkable.

A Bureau ruling will persuade some of the holdout incumbents to begin negotiating in good faith and should lead to additional negotiated relocation settlements. This will reduce the burden on the Commission's resources in having to resolve these

⁴ As detailed in the Nextel Petition, some of these incumbents have indicated that they would provide basic information once Nextel provides a list of the *exact* "lower" 800 MHz channels that will be used to relocate their systems. However, Nextel needs the requested basic information so that it may, in fact, choose the exact channels because the choice of channels can depend on such factors as the type of equipment used, the combiner scheme employed, the number of mobile units on the system, etc. Nextel has complied with these requests by providing tentative lists of proposed channels, including all of the channels it has available in the respective market for the relocation, with the hope that the incumbent holdouts will choose the channels they would like, but such incumbents have simply rejected all of the tentative channels out of hand as unsuitable, without any technical explanation.

Others among the incumbent holdouts have insisted that Nextel must enter into a binding agreement, with guarantees of "comparability," before they will disclose any technical information about their systems. This is not a commercially reasonable demand, as discussed below. This approach ignores the fact that while EA licensees are required to negotiate in good faith with incumbents, they are *not required* to relocate every incumbent. An EA licensee must be able to determine if the relocation is economically and practically feasible before binding itself to a contractual agreement, and the requested basic information is needed for making that determination. Finally, other incumbent holdouts have not even responded to Nextel's requests despite numerous attempts by Nextel to initiate negotiations.

cases in contested involuntary relocation proceedings. In addition, Nextel wishes to ensure that it is not unfairly penalized, through loss of involuntary relocation rights, in cases where it may be prevented from making a channel-specific good faith offer by incumbents that refuse to provide basic technical information.⁵

Only three sets of comments were filed in response to the *Public Notice*.⁶ The dearth of comments demonstrates that the issues raised by Nextel are not controversial and that the need to exchange basic technical data is widely understood throughout the industry as an intrinsic element of the good faith negotiation obligation of an incumbent. As Nextel's Petition demonstrates, the same information disclosure requirement established by the Commission for relocations in the microwave, Personal Communications Service ("PCS") and Mobile Satellite Services ("MSS") serves as clear precedent supporting the ruling Nextel seeks in this proceeding.⁷

⁵ Some holdouts appear to believe that by not proving basic technical information, they can prevent an EA licensee from making a good faith offer, and thereby evade involuntarily relocations. The Bureau should make very clear that this is not the case; i.e., that an incumbent's failure to supply this basic technical data does not prevent an EA licensee from making a good faith relocation offer.

⁶ Comments were filed by the American Mobile Telecommunications Association, Inc. ("AMTA"), an industry group that generally supports the Petition; Small Business In Telecommunications ("SBT"), represented by the same law firm that represents many of the incumbent "holdouts" who are the main subject of the Nextel Petition, who oppose the Nextel Petition; and Robin Critchell ("Mr. Critchell"), a part-owner of an upper-200 800 MHz licensee, who believes "good faith" determinations should be done on a case-by-case basis.

⁷ Nextel Petition at pages 6-7.

II. INCUMBENT SMR OPERATORS, AS REPRESENTED BY AMTA, SUPPORT THE NEXTEL PETITION

The comments submitted by AMTA are generally favorable to Nextel's Petition ("AMTA Comments"). AMTA agrees that the majority of upper-200 800 MHz incumbents are cooperating with EA licensees by pursuing good faith negotiations.⁸ It acknowledges "the majority of retuned incumbents apparently have provided sufficient detail to permit the development of an acceptable proposal, to date without obvious, adverse effect."⁹

AMTA's concern that this data may be competitively sensitive is easily put to rest. First, this basic data does not include any proprietary information, such as identities of customers or system profitability. Rather, the information only relates to the technical parameters of an incumbent's system – e.g., type of equipment, combiner scheme, number of mobile units – which is *necessary* to designing a replacement system. Secondly, Nextel does not seek this basic technical information for competitive advantage vis-à-vis these incumbents; indeed the information is no competitive value to Nextel, but is needed solely to effectuate a successful relocation of the incumbent so that Nextel can gain access to contiguous 800 MHz spectrum, and better compete with other nationwide commercial mobile radio service ("CMRS") providers such as AT&T Wireless, Sprint PCS and Verizon Wireless.

⁸ AMTA Comments at page 8.

⁹ AMTA Comments at page 3.

The above-described technical data is the very type of data that the Commission expects incumbent licensees to provide under the good faith requirement. As AMTA observes:

the failure to provide the requisite information will be a factor, likely a highly significant factor, in the resolution of [involuntary relocation cases]. To the extent an incumbent is unable to explain its refusal to provide that information to the satisfaction of the party reviewing the matter, the incumbent presumably will be found not to have negotiated in good faith as required by the FCC's rules.¹⁰

Nextel agrees with AMTA's observation, and believes that the requested ruling, by reiterating to incumbents that under the Commission's rules they are required to disclose basic technical information as part of their good faith obligation, will help to minimize the number of involuntary relocation cases.¹¹

III. SMALL BUSINESS IN TELECOMMUNICATIONS SEEKS TO GAIN AN UNFAIR ADVANTAGE FOR INCUMBENT LICENSEES IN THE NEGOTIATION PROCESS

SBT opposes the Nextel Petition.¹² SBT contends that exchanging technical information needed to develop a relocation plan is *not* part of the good faith negotiation requirement. Instead, SBT believes that an EA licensee must *first* enter into a binding relocation agreement with an incumbent that includes guarantees that the EA licensee will provide "comparable" replacement facilities as defined in the Commission's rules for

¹⁰ *Id.*

¹¹ AMTA also addresses the issue of "progress payments" – an issue that was not raised in the Nextel Petition or in the *Public Notice*. Nextel has addressed this issue elsewhere in this docket and, because AMTA's Comments raise nothing new in this matter, Nextel will refrain from addressing it here.

¹² Nextel notes that SBT is represented by the same legal counsel as many of the incumbent "holdouts" who have refused to provide basic technical data.

involuntary relocations, *before* the incumbent need exchange any basic technical information regarding its system.¹³

As detailed in the Nextel Petition, this position is contrary to legal precedent established in other Commission relocation proceedings.¹⁴ SBT does not explain why this precedent is inapplicable in the current proceeding. In fact, SBT ignores the precedent entirely in its comments.

Moreover, SBT's position makes no commercial sense. A relocation contract must contain specific terms for the relocation, e.g., the specific channels and technical parameters that the new system will meet. It is not sufficient to merely reference the general "comparability" framework established in the involuntary relocation rules. What SBT suggests would require an EA licensee to give an open-ended guarantee, i.e., that it will provide a *specific* replacement system that will meet parameters *that have not been disclosed*. No EA licensee can be expected to guarantee that a new system will meet the technical parameters of an old system, without knowing the technical parameters of that system. It is unreasonable to demand such a guarantee and then claim it is part of a "good faith" negotiation.¹⁵

SBT ignores the fact that while the Commission's rules require parties to negotiate in good faith, they do not require EA licensees to relocate every incumbent.

¹³ SBT Comments at pages 2-3.

¹⁴ Nextel Petition at pages 6-7.

¹⁵ In support of their interpretation, SBT suggests that, "[t]he type of equipment employed by an incumbent is not relevant to the terms of an agreement which is drafted in accord with the Commission's Rules and decisions." This is simply incorrect. For example, the type of equipment the incumbent uses determines the combiner scheme that is employed, which is a limiting factor in choosing replacement channels. The type of equipment also determines the type of replacement radios that may be required. For example, Motorola radios will not work on an LTR system.

The rules contemplate that there may be situations where it is not practically or economically feasible for an EA licensee to relocate an incumbent to comparable facilities. For example, if, during good faith negotiations with an incumbent, it becomes clear that, based on unique technical parameters of the incumbent's system, relocating the system would be too costly, then the EA licensee may choose not to relocate the system.

SBT also contends that, "Nextel has chosen unilaterally to turn the receipt of technical information into a condition precedent to contract negotiations."¹⁶ However, the record should be clear that Nextel has offered to negotiate with virtually all incumbents, including those represented by counsel to SBT, who did not initially provide any technical data. In all cases where the data was supplied during the negotiations, the parties reached an agreement or are still negotiating. However, in many cases where an incumbent did not supply the data, and was represented by counsel to SBT, the offer to negotiate was not accepted. In fact, in most of these cases the incumbents did not even respond to Nextel's negotiation offer.

According to SBT, Nextel's Petition is premature, and the Bureau should not take action until the involuntary relocation period begins, after March 5, 2001.¹⁷ However, such delay would frustrate the main purpose of the Nextel Petition, which is to encourage the incumbent holdouts to negotiate in good faith during the balance of the mandatory negotiation period, with the goal of reducing the number of involuntary relocation proceedings that EA licensees will be forced to commence before the Commission. Therefore, SBT's request to delay a ruling should be rejected.

¹⁶ SBT Comments at page 3.

¹⁷ SBT Comments at page 4.

SBT also disagrees that incumbents who fail to abide by the good faith negotiation requirement should be subject to license revocation.¹⁸ It is not Nextel's position that *all* incumbents that fail to reach agreement with an EA licensee should be subject to revocation. Revocation would be applicable *only* in those cases where incumbents intentionally fail to negotiate in good faith. For example, in the most egregious cases, despite numerous notifications and attempts to initiate relocation negotiations, some incumbents have never even responded and appear to have entirely disregarded their obligation to negotiate. License revocation is a justified sanction for this type of willful and repeated disregard of the Commission's mandate to negotiate in good faith.

Similarly, incumbents that willfully seek to frustrate the relocation provisions of Section 90.699 of the Commission's Rules by refusing to exchange necessary information commit an egregious rule violation. Not only do such licensees impinge on the relocation rights that EA licensees obtained at auction, but they undermine the public interest in establishing EA operations in the upper-200 800 MHz band. Such licensees should be subject to the full panoply of Commission sanctions, including license revocation.

Finally, SBT contends that granting the Nextel Petition would have the effect of "creating a presumption of bad faith" against incumbents that do not exchange required

¹⁸ *Id.* Likewise, Mr. Critchell, a partner in an upper-200 800 MHz license, is primarily concerned that incumbents who negotiate in good faith will still be subject to revocation. Nextel is not suggesting that incumbents that negotiate in accord with the good faith negotiation requirement should be subject to the revocation sanction discussed in the Nextel Petition. Of course, such licensees could still be subject to involuntary relocation if continued negotiations do not lead to a timely agreement.

information.¹⁹ This concern is misplaced. Exchanging information is already an integral part of the good faith negotiation requirement, and therefore, the presumption already exists. A ruling by the Bureau would create no new obligation, but would give the small number of non-cooperating holdouts a clear statement of what Section 90.699 requires. It would, in effect, give these parties a “second chance” and allow them to take advantage of the opportunity afforded by the Bureau’s extension of the mandatory negotiation period to reach a negotiated settlement. Ultimately, a Bureau ruling now will help to reduce the number of involuntary negotiation proceedings brought before the Commission later.

IV. CONCLUSION

In view of the foregoing, Nextel urges the Bureau to provide the requested Declaratory Ruling on an expedited basis.

Respectfully submitted,
NEXTEL COMMUNICATIONS, INC.

Date: December 21, 2000



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¹⁹ SBT Comments at page 4.

CERTIFICATE OF SERVICE

I, Matthew J. Plache, hereby certify that on this 21st day of December, 2000, I served a copy of the foregoing Reply Comments on each of the following by depositing the same with the U.S. Mail, with first-class postage, prepaid:

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A handwritten signature in black ink, appearing to read "Matthew Plache", written over a horizontal line.

Matthew J. Plache